Canada Industrial Relations Board | Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for Decision

Syndicat des employé(e)s de TVA, Local 687, CUPE,

applicant,

and

TVA Group Inc.,

employer.

Board File: 28750-C
Neutral Citation: 2012 CIRB **665**
November 28, 2012

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Daniel Charbonneau and André Lecavalier, Members. Hearings were held before the panel from March 13 to 15, 2012, but owing to the incapacity of a panel member, the matter was reassigned to the Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

The hearings continued on April 23, May 17 and 18 and July 4, 2012. The hearing of April 23, 2012, took the form of a site visit of 1600 De Maisonneuve Boulevard East in Montréal.

Appearances

Ms. Isabelle Leblanc and Mr. Yves Morin, for the Syndicat des employé(e)s de TVA, Local 687, CUPE;

Mr. Hubert Graton and Ms. France Legault, for TVA Group Inc.

I–Nature of Application

[1] The Board has before it an application filed on May 10, 2011, pursuant to sections 16(*p*)(i), 16(*p*)(vii) and18 of the *Code* by the Syndicat des employé(e)s de TVA, Local 687, CUPE (the union or CUPE). The union is seeking a declaration by the Board that its bargaining certificate (order no. 9805-U) covers the work performed by 26 employees of TVA Interactif who work on the premises of TVA Group Inc. (the employer or TVA Group).

[2] The union's bargaining certificate reads in part as follows:

> all employees working at TVA Group Inc. in Montréal, **excluding** the positions identified in the attached Appendix "A".
>
> ...
>
> APPENDIX "A"
>
> **1. Persons employed in a managerial or trustee position, comprising access to confidential information relating to labour relations, namely:**
>
> **Executive Secretary**
> **Administrative Assistants**
>
> **Programming:**
> - Programming Schedule Coordinator
> - Films Coordinator
> - Managers, Business Coordinator
> - Development and Programming Coordinators
>
> **Finance:**
> - Financial Analysts
> - Managers, Accounting and Development
> - Systems Managers
> - Cost Analysts
> - Payroll Managers/HR
> - Payroll Officers/HR
> - SAP Development Consultant
>
> **Technologie and Media:**
> - Project Managers - Informatics
> - Project Managers - Engineering
>
> **Legal Affairs:**
> - Legal Counsel
> - Legal Secretaries

Human Resources:
- Employee Benefits Advisors
- Human Resources Advisors
- Training Advisors
- Labour Relations Advisors
- Secretaries

Corporate Communications:
- Project Managers
- Project Managers - Publicity and Promotion
- Coordinators - Publicity and Promotion

Operations:
- Auxiliary Services Managers
- Project Managers - Plant layout
- Productive Resources Coordinators and Assignment Manager
- Resources and Postproduction Coordinators

2. Employees of employers other than TVA Group Inc., which business place is located at 1600 De Maisonneuve East, namely:

- JPL Production Inc.
- JPL Production II Inc.
- TVA Ventes et Marketing Inc.
- HSS Canada Inc.
- TVA International Inc.
- TVA Direct Inc.
- Club TVAchat Inc.

3. Employees already covered by other bargaining certificates.

[3] This bargaining unit was established pursuant to a certification order issued by the Board on May 10, 2000 (order no. 7776-U), further to the decision issued in *TVA Group Inc.*, 2000 CIRB 67 (RD 67) in relation to an application for review of the structure of four bargaining units.

[4] TVA Interactif is a division of TVA Group. It designs, programs and administers the Web-based platforms for the Internet sites of TVA Group and some specialty channels associated with TVA Group. Prior to 2010, such operations were performed by non-unionized employees of Canoe, a subsidiary of Quebecor Media, which is independent from TVA Group.

[5] In 2010, TVA Interactif took over part of Canoe's operations in order to focus on the design, programming and administration of the Web-based platforms for TVA Group's Internet sites.

[6] As a result of those changes, some Canoe employees were transferred to TVA Interactif and the content managers who formerly worked at TVA Interactif were transferred to the Programming department.

II–Introductory Remarks

[7] By way of introduction to the evidence adduced, counsel for the employer submitted that the operations performed by TVA Interactif are, by their very nature, provincially regulated, since they are not related to broadcasting. Counsel added that the operations in question are divisible and severable from TVA Group's core operation, which is broadcasting, and that this has been the case for a number of years. He pointed out that TVA Interactif services are not reserved solely for the broadcasting operations of TVA Group, but are also provided for other operations carried out by subsidiaries of TVA Group such as TVA Publications, a magazine publishing company. He cited the Board's recent decision in *Exploration Production Inc.*, 2011 CIRB 583, in which the Board had found that Website operations at Exploration Production Inc. (EPI) were not interprovincial and did not transform the company's production undertaking into a federal broadcasting entity. He submitted that the operations of TVA Interactif are more limited than those considered in *Exploration Production Inc.*, *supra*.

[8] In the alternative, counsel for the employer submitted that if the Board deems that the operations of TVA Interactif are, by their nature, federally regulated, it should nevertheless dismiss the union's application because the history of the bargaining certificate at issue shows that the Board did not create a general unit when it merged the four bargaining units in its decision of April 26, 2000 (RD 67). He added that not all employees of TVA Group are unionized, even though some functions are seemingly the same. He pointed out that Appendix A of certification order no. 7776-U, issued further to RD 67, contains a list of excluded positions with TVA Group and other employers. He closed by stating that the Board should not give any weight to the fact that TVA Interactif is not in itself a corporate entity. He added that the union had failed to produce any evidence to show that the employees covered by the application wanted to be unionized.

[9] The union, for its part, submitted that the employees covered by the application fall within the intended scope of its bargaining certificate since they perform duties associated or linked with those performed by the analysts, Web editors and technicians it represents. The union alleged that the bargaining certificate at issue is for a general unit. It added that TVA Group is engaged in broadcasting operations, which are federally regulated, and the Board must consider TVA Group as a whole, rather than only the operations carried out by TVA Interactif. Counsel for the union submitted that the only issue to be determined by the Board is the intended scope of the bargaining certificate issued on May 10, 2000 (order no. 7776-U). He added that the instant matter does not involve contracting out and the issue of jurisdiction does not arise in relation to the divisible or indivisible nature of the operations engaged in by TVA Interactif; otherwise, he argued, there would be constant carving up of undertakings.

III–The Evidence

[10] The panel of the Board visited the site of 1600 De Maisonneuve Boulevard East in Montréal, which houses the broadcasting operations of TVA Group Inc. and the operations of TVA Interactif.

[11] The visit provided the Board with an overview of the work done by the 26 people covered by the application in the instant matter and also gave it some perspective for the testimony that it would subsequently hear. In the course of the visit, the Board had the opportunity to observe and to question staff members about the nature of their work and the manner in which various operations are carried out. The Board also visited the space occupied by those working in TVA Interactif services (8th floor), IT (8th floor), programming (content managers) (5th floor), programming (television programming schedule) (5th floor), videography (ground floor) and the newsroom (Web editors) (10th floor). It was agreed with the parties that the evidence gathered during the visit would be entered into files 28865-C, 29183-C and 29288-C.

[12] The Board also heard several witnesses. Although the application was filed by the union, counsel for the employer agreed to present evidence first at the hearing, to ensure a better understanding of the organizational structure of TVA Group.

[13] The employer called the following witnesses:

- Mr. Pascal Cadieux, Head of Design, development and maintenance at TVA Interactif;
- Ms. Caroline Roy, Manager at TVA Interactif;
- Mr. Christian Bougie, Human Resources Manager with TVA Group Inc.

[14] The union called the following witnesses:

- Ms. Nathalie Blais, Union advisor with the CUPE research unit;
- Mr. Pascal Legault, Set builder;
- Ms. France Picard, Videography technician;
- Ms. Caroline Roy, Manager, TVA Interactif;
- Mr. Jean-Marie Caouette, Head of the Videography group;
- Mr. Pascal Bélanger, Analyst-Programmer;
- Mr. Réjean Beaudet, President of the union.

[15] For the sake of clarity, the evidence will be summarized under more descriptive headings.

A–Transfer from Canoe to TVA Interactif

- **Witnesses for the employer: Mr. Pascal Cadieux and Ms. Caroline Roy**

[16] The first witness heard was Mr. Pascal Cadieux, Head of Design, development and maintenance at TVA Interactif. From 2008 to February 2011, he worked as a Development supervisor at Canoe, a subsidiary of Quebecor Media, located at 800 Square-Victoria Street. In February 2011, he was transferred to TVA Interactif, located at 1600 De Maisonneuve Boulevard East in Montréal. He now works for TVA Group.

[17] According to Mr. Cadieux, when he worked for Canoe, he was responsible for the development of the Website for TVA Group. He stated that there were seven or eight people assigned to Web development for TVA Group. The team was subsequently transferred to TVA Interactif, with TVA

Group, and he was then appointed unit head. Mr. Cadieux indicated that his production team is responsible for the graphic design of the Website and incorporation of graphic elements into TVA Group's Website. In other words, he stated, the production team that he heads works on the Website's shell, that is, its form rather than its content. He explained that his team acts as an outside agency, receiving order books from clients such as TVA Publications or TVA Group specialty channels. He stated that clients submit order books and a management team at TVA Interactif works out the estimated costs and timetable. His team then designs all the visuals for use on the Internet site (e.g., logo, photos) based on the specifications provided. Mr. Cadieux indicated that TVA Interactif does not put the content online; that responsibility falls to the client itself. He stated that his team has no experience in the broadcasting area.

[18] Mr. Cadieux commented on the job descriptions filed by the employer in support of its evidence, adding that all of the positions in question had existed at Canoe and had been transferred to TVA Interactif in 2011.

[19] On cross-examination, Mr. Cadieux explained that his professional relations with clients involved contacting the clients by email or meeting with them in person. For example, TVA Nouvelles is a client with which his team often works. He admitted that at times they are in touch with reporters and lend them a hand in the same way they lend a hand to employees with TVA Sports, who sometimes encounter problems in putting their programming online. He indicated that he also has professional relations with other TVA Group teams such as the content managers, project managers and programmers, who sometimes have problems putting their content online.

[20] On redirect by counsel for the employer, Mr. Cadieux indicated that when he had been working for Canoe, he had performed exactly the same work and had had the same professional relations with TVA Group employees as at present.

[21] Ms. Caroline Roy, a manager with TVA Interactif since August 16, 2010, confirmed Mr. Cadieux's testimony that the team she manages previously worked at Canoe. According to Ms. Roy, Canoe had been responsible for all the Internet sites, including those of TVA. She indicated that the move to the premises of TVA Group had been the result of a need for more space on the part

of Sun Media. She explained that Canoe had retained some operations, including the hosting services for TVA Websites.

- **Witnesses for the union: Ms. Nathalie Blais and Mr. Réjean Beaudet**

[22] The union called Ms. Nathalie Blais, a union advisor with the CUPE research unit. Ms. Blais previously worked as a reporter for Le Canal Nouvelles (LCN) and as an assistant to the bureau chief. She has been on leave without pay since May 30, 2011. She has held a number of union positions since 1999 and sits on the Grievance Committee and Bargaining Committee.

[23] Ms. Blais referred the Board to a document by the Canadian Radio-television and Telecommunications Commission (CRTC) entitled "Developments in the Canadian Program Rights Market 2011" to show, among other things, that Canadians are the world's leaders in Internet usage and have become major users or consumers of online videos. She added that the CRTC requires that every broadcaster submit an annual report on Internet usage in its operations.

[24] Ms. Blais submitted that TVA's brief in connection with the renewal of TVA Group licences in 2011 indicated the following: "it is no longer feasible for a traditional broadcaster to ignore the proliferation of new viewing platforms and plan to continue using the same approach as five or ten years ago." (translation). She added that TVA needs greater license flexibility as a result of technological changes.

[25] Additionally, Ms. Blais drew the Board's attention to the comments made by Mr. Pierre Dion, President and CEO of TVA Group, in April 2011, particularly the following (Exhibit P-1, tab 18):

> In recent years, the media world as a whole has been drawn into a veritable revolution—not only a technological revolution but a revolution in the way people think.
>
> The ways in which we create content, produce programs and broadcast those programs are completely different from what we were doing in television only 10 or 15 years ago, or when I arrived at TVA in 2004.
>
> Today, we have to do everything we can to meet viewers' expectations. We have to provide the content and products they want when and where they want them, using the medium they prefer.
>
> ...

> Seven years ago, TVA Group had basically two components in television: the TVA network and the LCN channel. The company was essentially nothing more than a broadcaster of content using a single platform.
>
> Seven years down the road, TVA had seven specialty channels and confidently shifted from the status of broadcaster to that of creator and producer of multiplatform content, and the company is now strategically positioned in English Canada.
>
> (translation)

[26] Mr. Réjean Beaudet, President of the union since 2009, though he has held union positions since 1994, recognized that when he took over as President, Canoe was the one that dealt with the TVA and LCN Websites. Mr. Beaudet recounted two instances where TVA Group management had spoken about the importance for TVA Group's future of using new broadcasting platforms, referring in particular to Websites.

B–Operations of TVA Interactif

- **Witness for the employer: Ms. Caroline Roy**

[27] Ms. Caroline Roy indicated that she had reorganized her group when she had joined TVA Interactif, which has three business segments: development, project managers (client relations) and Web strategy consultants. Her division provides services to the different components of TVA Group and to outside clients, such as independent producers (Pixcom, Productions J, Star Académie, etc.).

[28] Ms. Roy described the work done by TVA Interactif as follows:

- A client calls and asks that a Website be designed or that an application be added to its Website, or indicates that it wants to raise its visibility with a target audience; the strategy team develops a business proposal for the client and, once the proposal is accepted, a cost assessment is performed.

- The project manager team then takes over to bring the project to fruition in line with a detailed budget. Those responsible for digital strategy propose solutions to maximize expected return. They write down ideas and recommendations to meet client requirements.

- The Web production people then start working in tandem with the Web strategy people and ensure that the client understands the process.

[29] Ms. Roy stressed the fact that her team has nothing to do with content development. According to Ms. Roy, TVA Interactif provides clients with a shell, which can then be used by the client or content producers or editors. Her team also provides training for those who will have to manage their sites, whether they be TVA producers or outside people. In addition, the TVA Interactif team deals with any problems encountered by the client in terms of the functionality of a Website. However, Canoe is the one that deals with any Website content or hosting problems.

[30] On cross-examination, Ms. Roy indicated that she herself had never been an employee of Canoe. She had been hired by TVA Group in 2010. She reports to Mr. Pierre Dion, President and CEO of TVA Group. In response to a request by counsel for the union, Ms. Roy distinguished between TVA Interactif's internal clients and those she considers to be outside clients. A document was filed in evidence in this regard. Internal clients are, for instance, TVA Nouvelles, TVA Productions, TVA Ventes et Marketing and TVA Sports, while outside clients include Occupation double 2010 inc., Productions Les Affranchis, Pixcom, Sphère Média Plus, etc. She indicated that about 50% of clientele is internal, while the other half comprises outside clients.

[31] Ms. Roy added that TVA Interactif is responsible for the design, programming and administration of the platform for the Websites. She stated that her team is not responsible for the day-to-day administration or maintenance of the Websites. She also indicated that those in charge of the content managers, that is, those who add content to the shells provided by her team, work on the 5th floor of 1600 De Maisonneuve Boulevard East. She admitted that when she had joined TVA in July 2010, there had been content managers working at TVA Interactif. However, as a result of a reorganization and a shift of employees from Canoe, the content managers no longer formed part of her team.

[32] In regard to the costs associated with the services provided by TVA Interactif, fees are set by TVA Group, which also handles billing.

C–Integration of TVA Interactif Operations with TVA Group Operations

- **Witness for the employer: Mr. Christian Bougie**

[33] The third witness for the employer was Mr. Christian Bougie, Human Resources Manager with TVA Group since 2004. Mr. Bougie has worked in the human resources field for 30 years. He indicated that only unionized employees of TVA Group are required to complete time sheets. Non-unionized employees do not complete any forms unless they take sick leave.

[34] Mr. Bougie spoke about certification order no. 7776-U entered into evidence, Appendix A of which lists excluded employees of other TVA Group employers which business place is located at 1600 De Maisonneuve Boulevard East. According to Mr. Bougie, such employers include TVA Ventes et Marketing, which is responsible for selling advertising for TVA; TVA Accès, which handles commercial production and is part of TVA Ventes et Marketing; TVA Productions (formerly JPL Production Inc. and JPL Production II Inc.), which produces television programs as an independent producer; TVA Films, a film distributer; TVA Création, which designs new programs; and Sun TV in Toronto. In his view, TVA Interactif is also one of those employers.

[35] As regards the "Guide and working conditions" (translation) entered into evidence, Mr. Bougie indicated that the guide applies to all non-unionized staff members, whether or not they work in an incorporated division of TVA Group, with the exception of the employees of TVA Publications.

[36] With regard to TVA Interactif, Mr. Bougie explained that this division used TVA Group's accounting system in the same way as employees in other divisions excluded from the bargaining certificate in question in the instant matter. As for the Human Resources division that he heads, Mr. Bougie explained that all divisions of TVA Group, whether or not they are incorporated, and whether or not their staff is unionized, are served by that division, as well as the Finance,

Communications and Procurement divisions. In relation to access cards for 1600 De Maisonneuve Boulevard East, he explained that everything is centralized within the Security division and all employees working in the building have an access card, including employees of other TVA Group employers and even the employees of Vox, which rents space in the building.

- **Witnesses for the union: Ms. Nathalie Blais, Mr. Pascal Legault, Ms. France Picard, Ms. Caroline Roy, Mr. Jean-Marie Caouette, Mr. Pascal Bélanger and Mr. Réjean Beaudet**

[37] The witnesses for the union described in general terms similarities and differences between the duties of TVA Interactif employees and those of unionized employees.

[38] Ms. Nathalie Blais submitted that, on March 15, 2011, the union had filed a group grievance relating to a non-unionized employee (Mr. Martin Dubé) who had been working and performing the duties of a Web integrator for TVA Interactif. According to the union, the employee in question had been performing duties that were covered by its bargaining certificate because he had been providing the Web team with technical support. Ms. Blais indicated that a Web editor with LCN was unionized and part of the bargaining unit in question in the instant matter.

[39] On cross-examination, Ms. Blais admitted not having discussed Mr. Dubé's duties with him. Counsel then referred the witness to the employer's response to the union's grievance, which indicated that the Web integrator position held by Mr. Dubé was not covered by the bargaining certificate since Mr. Dubé did not do any writing.

[40] The union's second witness was Mr. Pascal Legault, who has worked for TVA since 1981. He has held a team leader position in set building for the past 15 years. He is responsible for set design, construction methods and related costs. His customers are independent producers both with and outside TVA Group. He indicated that he uses TVA Group service requests to meet his clients' needs. Procedures are the same for internal and outside clients.

[41] The third witness for the union was Ms. France Picard, a unionized videography technician. Her duties consist in planning and designing still images and audiovisual work (e.g., photo processing,

digitization, graphic art/logos for television programs). She explained that she designs logos that are generally used on the Website. Since May 2009, Ms. Picard has held union positions, as secretary and union steward, and has sat on the job evaluation committee that among other things has been looking at whether the duties of unionized positions are appropriate and has also been examining job classification requirements.

[42] Ms. Picard commented on a document entered into evidence that shows a number of unionized positions whose duties require similar training to that required for television or that are similar to TVA Interactif positions (Exhibit P-16, tab E) for which recognition of coverage by the bargaining certificate is being sought in the instant matter.

[43] Ms. Caroline Roy, a manager at TVA Interactif, was again called as a witness, this time by the union. Ms. Roy described the work done by her team when it is asked to insert a logo or video content into the Web-based shell designed by her team. She explained that her team does not provide any content to clients but rather creates a space and parameters to enable production teams responsible for content to insert content.

[44] Mr. Jean-Marie Caouette, Head of the Videography group, was the next witness called. He indicated that he heads a group of 30 employees that covers three areas: information, the character generator and computer graphics/graphic design. The work done by Mr. Caouette's team has nothing to do with the Website; the team works only on television programs. Mr. Caouette explained the approach used with clients—he determines the needs of the television producer and estimates related costs. He indicated that everything is coordinated by TVA Productions and that his procedures remain the same for internal or outside producers of TVA Group. He stated that the duties performed by the people on his team and the knowledge required are similar to, for example, those of an apprentice Web designer on the TVA Interactif team.

[45] Mr. Pascal Bélanger was the next witness called. He indicated that he had been working for the Canadian Broadcasting Corporation for five weeks. He holds the position of Project manager, Internet digital service, and manages a team that is responsible for some of the CBC French network's Websites. The employees responsible for some of the CBC French network's Websites

are unionized. Previously, he worked for TVA Group as an analyst-programmer. In that capacity, he was responsible for developing applications and databases and, among other things, provided support for users (sales/broadcasting/news staff).

[46] In 1999, Mr. Bélanger held the position of Web editor–LCN, a unionized position. He indicated that his responsibilities and the knowledge required for the position had been almost exactly the same as those for the position of analyst-programmer with TVA Interactif.

[47] The last witness, Mr. Réjean Beaudet, indicated that he had carried out an analysis of positions posted for TVA Interactif, referring to the different job postings entered into evidence by the union. He stated that it was after he had carried out the said analysis and the union had noted the similarities between the unionized positions and TVA Interactif positions that the union had decided to file the application in the instant matter. Mr. Beaudet also commented on a presentation on the Website of TVA network specialty channels such as LCN and TVA Sports.

IV–Oral Arguments

A–The Employer

- **Constitutional Jurisdiction**

[48] With regard to the concept of constitutional jurisdiction, counsel for the employer reiterated the arguments he had made in his introductory remarks, to the effect that the operations of TVA Interactif are provincially regulated and severable from the operations of TVA Group. He submitted that even if the Board were to find that the operations of TVA Interactif are federally regulated, the history of the bargaining certificates issued prior to the decision of April 26, 2000 (RD 67) shows that the certification at issue in the instant matter is not general certification but, rather, the result of a merger of four bargaining units. He added that TVA Interactif had never been part of any of the four units merged into a single unit by the Board on April 26, 2000. Additionally, counsel for the employer submitted that the union's application pursuant to section 18 of the *Code* ignores a

"cardinal" rule in that the union did not produce any evidence to show that the employees wanted to be unionized.

[49] Counsel pointed out that the duties performed by TVA Interactif employees had previously been performed by employees of Canoe, a non-unionized company that develops Websites and hosts the servers for the Websites of Quebecor Media and other groups. Counsel drew the Board's attention to its decision in *City-TV, CHUM City Productions Limited, MuchMusic Network and BRAVO!, Division of CHUM Limited*, 1999 CIRB 22 (RD 22). In that matter, the issue had been whether the *Code* applied to the labour relations of CityInteractive, a division of CHUM Limited (CityInteractive). CHUM Television had objected to the application of the union, which had wanted employees of CityInteractive to be included in its bargaining unit. CityInteractive's primary operations involved designing, producing and maintaining Websites based on the CHUM Television brands. Counsel pointed out that, in that matter, the Board had determined that CityInteractive was an integral part of CHUM because it had been shown that CityInteractive was a fully integrated component of the broadcasting undertaking.

[50] Counsel for the employer submitted that, in this matter, unlike CityInteractive, TVA Interactif does not control TVA Group content or put that content online. He explained that CityInteractive's routine operations had involved connecting provinces on a regular and continuous basis and taking television programs online. Thus, CityInteractive had not merely been a Website editor; it had carried out broadcasting-related operations.

[51] Counsel for the employer submitted that TVA Interactif develops shells for TVA Group and that it is not responsible for content. He adds that other TVA Group employees are responsible for taking the Websites online. He submits that there are no operational links between TVA Interactif and the other TVA Group employees, stressing that the operations of TVA Interactif used to be carried out by Canoe.

[52] Counsel further submitted that the evidence showed that 80% of the Websites designed by TVA Interactif involve the operations of independent producers and entities that are TVA Group subsidiaries not in any way involved in telecommunications.

- **Intended Scope of Bargaining Certificate**

[53] With respect to the intended scope of the bargaining certificate in the instant matter, counsel drew the Board's attention to paragraphs 10 and 11 of RD 67, in which the Board had merged the four units, maintaining that the Board had merely combined the four units without deciding to establish a general unit. He asked that the Board take into account the history of the bargaining certificates in effect prior to RD 67 of April 26, 2000. He argued that the Board had not created a new bargaining unit, as when an application is made pursuant to section 24 of the *Code*, and that no additions had been made to the new unit combining the four certificates.

[54] Counsel for the employer referred to the numerous exclusions listed in Appendix A of the bargaining certificate to show that the certificate is not general in scope, contrary to what the union contended. The certificate excludes employees of several other employers not necessarily located at 1600 De Maisonneuve Boulevard East, which employers are wholly owned subsidiaries of TVA. Counsel added that what characterizes the employers excluded under section 2 of Appendix A is the fact that their operations are not directly associated with taking programs on air or producing the programs produced directly by TVA. According to counsel, this is also the case with the operations of TVA Interactif and all the operations linked with promotion, commercial production and audiovisual content, not to mention the employers that are excluded because they are provincially regulated. Counsel for the employer submitted that the exclusion set out in section 2 of Appendix A is not static and also applies to the operations of other TVA employers, such as TVA Interactif. He stressed that the mandate of TVA Interactif is not broadcasting via the Internet or making programs available to viewers on the Internet. Its sole mandate is to create shells for Websites. He submitted that the Board had to give the bargaining certificate a narrow interpretation.

[55] According to counsel, the evidence shows that TVA Interactif merely creates shells for clients' Websites, such as TVA's general Website, the TVA Nouvelles Website, the Websites of independent program producers (internal and outside producers) and the Website of TVA Publications and specialty channels. Such Websites serve to promote their respective brands. He added that TVA Interactif operations do not make it possible to watch TVA programs. A document entered into

evidence by the employer moreover shows that 85% of TVA Interactif revenues come from outside producers and from TVA Publications, whose operations are excluded from the bargaining certificate at issue.

[56] Counsel argued that the fact that TVA Interactif is not a corporate entity independent of TVA Group was not significant in itself, since the evidence showed that its operations are not integrated into those of TVA Group and, therefore, are severable from the broadcasting operations. Counsel stated that, although TVA Interactif's operations are now carried out at the same address as those of TVA Group, this does not mean that they automatically fall within the intended scope of the bargaining certificate; otherwise, according to counsel, the exclusion of other employers provided for in Appendix A would make no sense. The operations of TVA Interactif do not allow viewers to watch programs—only the TVA and TVA Nouvelles sites make this possible.

[57] Counsel closed his arguments by stressing that the intended scope of the bargaining certificate in question in the instant matter is merely the production of programs produced by TVA Group, as in the case of TVA Nouvelles. He contended that the fact that unionized employees can do the work of TVA Interactif employees is not relevant in itself, adding that, in any event, none of the employees covered by the union's application had expressed a wish to be unionized. He asked that the union's application be dismissed.

B–The Union

- **Constitutional Jurisdiction**

[58] With regard to the issue of constitutional jurisdiction, counsel referred to his introductory remarks. He submitted that, since the operations engaged in by the employer are federal in nature, there was no need for the Board to determine whether TVA Interactif is a provincially or federally regulated undertaking or whether it is engaged in operations that are essential or integral to the operations of the employer, TVA Group. Counsel submitted that TVA Interactif is not an independent entity in itself; it is a "branch" (translation) or division of TVA Group in the same way as the IT or Programming divisions that work on broadcasting with TVA Group.

[59] Counsel entered into evidence the decision of the Federal Court of Appeal in *Canadian Air Line Employees' Association* v. *Wardair Canada (1975) Ltd. et al.*, [1979] 2 F.C. 91 (*Wardair*), stating that this decision was key, and drew the Board's attention to the following paragraph thereof:

> ... where something is done as an integral part of the operation of a federal work, undertaking or business and that something is *reasonably incidental* to such operation, it may be regulated by Parliament as part of the regulation of that work, undertaking or business even though it is not *essential* to the operation of such a work, undertaking or business; but where such a thing is made the subject of a separate local business or businesses, it cannot be regulated by Parliament merely because, if it were done as an integral part of operating a federal work, undertaking or business, it could, as such, be regulated by Parliament.
>
> (page 97)

[60] Counsel for the union stated that, in the same manner as in *Wardair*, *supra*, the operations of TVA Interactif are an integral part of the operation of TVA Group and are incidental to such operation, and they need not be deemed essential to be deemed federally regulated. He added that even though the operations of TVA Interactif had previously been carried out at Canoe, TVA Group had decided to repatriate them in 2010 and so it was not possible to now decide to carve up a service that TVA Group had chosen to integrate.

[61] In the same vein, counsel referred the Board to the employer's written submissions, which indicate that "in December 2009, it was decided that some of Canoe's commercial operations would be integrated into TVA and some employees would be transferred to TVA Interactif" (translation). Counsel also emphasized that, again in its written submissions, the employer had admitted that, until August 2010, TVA Interactif had had content managers within its ranks and that such employees had subsequently been transferred to the programming and specialty channel services.

[62] Counsel further submitted that the collective agreement binding TVA Group and the union shows that several positions, including that of telephone operator, are included in the bargaining unit even though they have no direct connection with broadcasting. He added that TVA Interactif is part of a complementary chain that allows programs or parts of programs to be broadcast over the Internet; its operations are in line with TVA Group's mission. Counsel referred to the decision in *Shamrock Television System Inc., CKOS-TV and CICC-TV* (1987), 70 di 168; and 17 CLRBR (NS)

205 (CLRB no. 639) (*Shamrock*), in which the Board had issued a certification order that had brought the employees working in the production unit and those working in the broadcasting undertaking's sales and administration together in the general unit. In that matter, the Board had reiterated the principle according to which jurisdiction flows not from the actual work performed by an employee, but rather from the work of the undertaking within which the employee functions. Counsel for the union argued that employees of TVA Interactif similarly provide services like the other divisions, and all efforts are aimed at a common objective, that of broadcasting television programs.

[63] Counsel also referred to RD 22 issued by the Board, in which the Board had found that the Webcasting services provided by CityInteractive, despite CityInteractive being an economically self-sustaining operation, constituted a form of broadcasting and formed an essential link in the CHUM broadcasting chain. Counsel for the union submitted that, like the operations in *CityInteractive*, the operations carried out by TVA Interactif employees are an extension of the operations carried out by the unionized employees of TVA Group. Counsel added that it should be borne in mind that Webcasting enables the undertaking to build viewer loyalty, pointing out in passing that all of the conventional channel's programs can be watched live. He argued that, although TVA Interactif operations are characterized as incidental, there is no reason to call such operations provincially regulated.

- **Intended Scope of Bargaining Certificate**

[64] With respect to the intended scope of the bargaining certificate, counsel argued that all of the testimony heard showed that the unit at issue is a general unit, since the members of the unit, regardless of whether they work in videography or in IT, on the Website sports service or the news service, work in cooperation with the employees of TVA Interactif. Counsel added that the evidence also showed that TVA Interactif is not independent, as all contracts, job descriptions, employment offers and client invoices come from one place, TVA Group services. As for the wish of TVA Interactif employees to be represented, counsel submitted that, as was the case for any position created within the company, positions with TVA Interactif should be part of the unit appropriate for bargaining.

[65] With regard to the employer's argument respecting the exclusions set out in Appendix A of the bargaining certificate, counsel for the union referred to a decision of the Board in *Laurentian Bank of Canada*, 2004 CIRB 295, in which the Board had determined that a universal description of a bargaining unit had to be interpreted liberally. He also referred to a decision of the Federal Court of Appeal in *Vidéotron Télécom Ltée* v. *Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90, in which the Court had dismissed an application for judicial review of a decision in which the Board had determined the intended scope of a bargaining certificate issued to the union to represent a group of employees of Vidéotron. In the original decision, a majority of the Board had dismissed the employer's argument that the merged unit of Vidéotron employees could not be greater in number than the two formerly separate units. That decision was upheld by both the reconsideration panel and the Federal Court of Appeal.

V–Analysis and Decision

[66] The union's application was filed under section 18 of the *Code*, which allows the Board to amend, alter, vary or update certification orders. The union is seeking a declaration from the Board that the duties performed by the employees of TVA Interactif are covered by its bargaining certificate. The employer, on the other hand, raises two arguments to contest the union's application, the first relating to constitutional jurisdiction and the second, to the intended scope of the bargaining certificate.

A–Constitutional Jurisdiction

[67] While the employer did not raise a preliminary objection respecting constitutional jurisdiction, its first argument is nonetheless that the operations of TVA Interactif are, by their very nature, provincially regulated, since they are not linked to radio or television broadcasting. If that is the case, maintains counsel for the employer, the labour relations of TVA Interactif do not come under federal jurisdiction and the *Code* does not apply. On the other hand, counsel admits that the employees of TVA Interactif are employees of TVA Group.

[68] Relying in particular on the decision in *Reference re: Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529, the union for its part submits that TVA is a federally regulated broadcasting operation and therefore all employees of TVA Interactif come under federal legislative jurisdiction. It argues that the Board must consider the operations of TVA as a whole, arguing that TVA Interactif is not a contractor or an independent corporate entity. It contends that constitutional jurisdiction is not at issue in this matter, citing among others the decisions in *Attorney General of Canada* v. *St. Hubert Base Teachers' Association et al.*, [1983] 1 S.C.R. 498; and *Shamrock, supra*.

[69] The key question under the circumstances is whether TVA Interactif is a non-severable part of TVA Group and whether together the two undertakings form a single undertaking for constitutional purposes. If so, even if TVA Interactif does not carry out federal operations *per se*, it will come under federal jurisdiction because it is operated in common with TVA Group, a federal undertaking.

[70] In *Westcoast Energy Inc.* v. *Canada (National Energy Board)*, [1998] 1 S.C.R. 322, the Supreme Court of Canada set out the applicable test to determine whether several operations together constitute a single federal enterprise or undertaking:

> 49. In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(*a*), **they must be functionally integrated and subject to common management, control and direction**. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not". He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. See *Central Western*, *supra*, at p. 1132.
>
> (emphasis added)

[71] The Board must therefore determine, on the basis of the evidence adduced, the degree to which the operations of TVA Interactif are integrated in a functional sense and are subject to common management. These factors were analyzed in depth in RD 22 and *Exploration Production Inc.*, *supra*.

[72] The Board has been called upon to apply the principle of indivisibility of the undertaking in the broadcasting industry on many occasions, but in particular in RD 22. That matter involved an application for a bargaining structure review filed by the union, which was seeking a declaration from the Board that the employees of CityInteractive, a division of CHUM Limited, were covered by its bargaining certificate. It is important to note that, unlike the circumstances in the instant matter, CityInteractive was a separate company and so ostensibly independent. In contesting the Board's constitutional jurisdiction, the employer, CHUM Television, argued that CityInteractive was an economically self-sustaining operation, separate and severable from the television operation and therefore independent from the broadcasting industry. CityInteractive's primary purpose was to design, produce, market, license and distribute interactive material, including Websites. The Board found that CityInteractive was part and parcel of the CHUM whole, as a fully integrated component of the television side of its broadcasting operation, and that the operations at issue were an indivisible part of a broader federal undertaking and thus came under federal jurisdiction. In RD 22, the Board had the following to say regarding the issue of whether a disputed operation is a severable part of a core federal undertaking, as has been argued by the employer in the instant matter:

> [108] It is well established that in the process of determining whether a disputed operation is a severable part of a core federal undertaking, the focus should not be on the "branch operations," to identify what portions of the federal undertaking can be extracted without interfering with the activity altogether. Rather, the focus should be on determining what is the undertaking which is in fact being carried on. The principle which underlies this is the indivisibility of the undertaking. ...

[73] Also in RD 22, the Board stated the following regarding cases involving operations where there is no distinguishable production undertaking, as in the instant matter:

> [117] On the other hand, in cases involving production operations where there was no distinguishable production undertaking, the Board found that these activities came under federal jurisdiction as integral and non-severable parts of the core broadcasting undertaking. This was the whole thrust of *Shamrock Television*, *supra*, where an allegedly segregated production division was found to be an integral part of a broadcasting undertaking, along with departments involved in the sale of air time and office administration. The Board held that these activities, secondary to the operation of a core broadcasting undertaking, were sufficiently integrated with the federal undertaking to become subject to the provisions of the *Code*. ...

[74] In contrast, in *Exploration Production Inc.*, *supra*, the Board found that the degree of functional integration and common management of EPI, a production company, and Discovery or Specialty was not sufficient to conclude that these undertakings formed a single undertaking for constitutional

purposes. In that matter, the Board found that EPI was, in essence, a production company capable of sustaining itself as such, separate and severable from Discovery or Specialty.

[75] On the basis of the evidence adduced in the instant matter, the Board considers that the operations of TVA Interactif and TVA Group are integrated in a functional sense and that TVA Interactif is not in itself an economically self-sustaining operation that is separate and divisible from TVA Group. In short, TVA Interactif is functionally, operationally and physically integrated in the broadcasting operations of TVA Group, in a manner similar to CityInteractive operations in RD 22.

[76] The evidence shows that the employees working for TVA Interactif were until February 2010 employees of Canoe, a subsidiary of Quebecor Media, which was independent from TVA. Until that time, the said employees were non-unionized and came under provincial jurisdiction. Their employer is now TVA Group and the services they provide involve designing, programming and administering Web-based platforms for TVA's Internet sites, including the Website of TVA Nouvelles and those of specialty channels associated with TVA Group, including prise 2, addick TV, CASA, Yoopa, Mlle, TVA Sports and Argent.

[77] Former Canoe employees were integrated into the TVA Interactif division of TVA Group. The TVA Group organization chart in fact shows that TVA Interactif is merely a "branch" or division of TVA, in the same way as, for example, the TVA Group's Communications and Human Resources divisions, whose employees are members of the bargaining unit. The evidence also shows that TVA Interactif existed prior to the transfer of the employees from Canoe and that content managers, who were unionized, used to be part of that division. The employees in question were subsequently transferred to a different division of TVA Group. The evidence also shows that the employees of TVA Interactif work closely with several different trades at TVA covered by the bargaining certificate, including reporters, content managers, project managers, programmers, videographers, etc. All of these people regularly associate with one another and work on the same floor as TVA Interactif employees or on different floors.

[78] The Board notes that TVA Interactif is not an independent corporate entity. Contrary to what the employer has contended, this can be significant in determining the degree of functional integration and common management of TVA Interactif operations. TVA Interactif is also not independent in terms of its human resources, communications, IT services, client invoicing and procurement. In other words, all the day-to-day services it requires to manage its affairs are provided by TVA Group, in the same way as for the other divisions. In contrast to the matter in *Exploration Production Inc.*, *supra*, TVA Interactif does not reimburse TVA Group for the cost of administrative services used by it. Administrative costs are covered through the same TVA Group general budget.

[79] According to the employer's key witnesses, Mr. Pascal Cadieux and Ms. Caroline Roy of TVA Interactif, their teams are in no way involved in the development of Web content; their work is limited to producing shells for both internal TVA Group clients (50%) and outside clients (50%). Those witnesses also stated that Canoe was responsible for dealing with Website content or hosting problems encountered by clients. However, the evidence also showed that fees for the services delivered by TVA Interactif are set by TVA Group, which is also responsible for billing. Consequently, TVA Group gains both financially and operationally from the services rendered by TVA Interactif.

[80] In the Board's view, the incorporation of the Canoe employees into TVA Interactif means that today their operations are part of TVA Group and it would be more than a little difficult to explain how those operations could be divisible or severable from the operations of TVA as a whole on the basis of the fact that the employees concerned used to be employees of a different employer, Canoe. The employer's argument that the employees of TVA Interactif are in no way involved with the content of the Website and that their operations in this regard are limited to designing the shells for the Websites has not satisfied the Board that their operations should be severed from the operations of TVA Group as a whole. In the Board's view, in this matter, it cannot draw a line between the people who design the shells and those who insert the contents. The evidence has shown that the TVA Interactif team is involved not only in developing the Website shells, but also in making any requested changes to the shell or its visuals. To repeat what the Board indicated in RD 22, the operations of the TVA Interactif team are "an essential link" in the broadcasting chain of TVA Group.

[81] In view of the foregoing, the Board finds that the operations of TVA Interactif are a non-severable part of the broadcasting undertaking of the employer, TVA Group, and labour relations associated with those operations come under federal jurisdiction.

B–Intended Scope of Bargaining Certificate

[82] In the alternative, counsel for the employer says that, in the event that the Board decides that the operations of TVA Interactif are, by their nature, federally regulated, it should nevertheless dismiss the union's application because the history of the bargaining certificate at issue shows that it is not general in scope. The union, on the other hand, argues that its certificate is for a general unit and the employees covered by its application perform duties associated or linked with those performed by members of its unit, referring to analysts, Web editors and technicians, among others.

[83] The issue to be decided by the Board is this: are the employees of TVA Interactif covered by the bargaining certificate held by the union, which the Board issued on May 10, 2000 (no. 7776-U), and replaced on January 26, 2010, with order no. 9805-U without amending the bargaining unit description? The Board must accordingly provide an interpretation of the intended scope of the certificate it issued on May 10, 2000.

[84] Labour relations between the parties have spanned several decades. It is useful to mention that the Board certified the union to represent all production and clerical staff working for Télé-Métropole Inc. (former name of TVA Group) in 1974. The Board also certified three other trade unions in the 1970s to represent employees of Télé-Métropole Inc., that is, the Association des techniciens de Télé-Métropole, in respect of a unit comprising all technical services employees; the Syndicat de l'information de Télé-Métropole, in respect of a unit comprising all employees working on air and in the news service (reporters); and the Association des réalisateurs de Télé-Métropole, in respect of a unit of producers.

[85] On April 18, 2000, a few days prior to issuing RD 67, the Board indicated the following in *TVA Groupe Inc.*, 2000 CIRB LD 225 (LD 225):

... Following an investigation of the application, the holding of public hearings and after carefully considering all the evidence and the parties' submissions, a panel of the Board composed of Ms. Suzanne Handman, Vice-Chairperson, and Messrs. J. Philippe Morneault and Edmund E. Tobin, Vice-Chairpersons, concluded that a single bargaining unit and a single bargaining agent were appropriate in this case. The various reasons for this decision include the Board's belief that a single unit is viable, eliminates jurisdictional problems, enhances lateral employee mobility and provides a structure that allows both the enterprise and the employees to deal with constant technological changes and challenges as they develop in the television industry. Moreover, in view of all the evidence in the record, the Board is satisfied that CUPE Local 687 represents a majority of the employer's employees in the new unit.

The Board intends to include all TVA employees at its Montreal location in the new bargaining unit, with the exception of positions that are specifically excluded. Consequently, in order to prepare the certification order, the Board is asking the employer and CUPE to provide it jointly with the list of positions to be excluded from the bargaining unit. The parties must submit this list on or before May 15, 2000. To facilitate their task, the parties concerned will find enclosed the list of exclusions now in the Board's possession. Should the parties fail to agree on this list, the Board reserves the right to determine which disputed positions will be excluded. As soon as this step is completed, the Board will issue the certification order.

(page 2; emphasis added)

[86] While it is true that RD 67 essentially related to an application to merge four bargaining units, as indicated by the employer, a closer look at RD 67, in light of the Board's remarks in LD 225, reveals that the panel of the Board intended to create a more general bargaining unit to allow TVA Group to deal with technological changes and foster employee mobility. In fact, at paragraphs 107 and 108 of RD 67, the Board stated the following:

[106] The concerns regarding the viability of a small support group of approximately 100 employees in comparison to a group of production employees numbering over 600 are evident. TVA considers that it would be preferable to separate this group such that it can deal with it separately and address issues that concern solely the support employees. The Board in this instance does not agree. The support employees forming less than 20% of the unionized complement of employees in the Board's view would not be a viable unit, particularly in light of the importance given to the remaining employees whose functions are considered to be at the heart of production.

[107] While not binding, the tendency in the television industry is to group employees in one unit. The case of Société Radio-Canada, while having a number of parallels, has a number of distinctions, including the original composition of its bargaining units, the public nature of the enterprise, the number of employees involved and the number of television stations spread out across the country.

[87] Further to RD 67 issued on April 26, 2000, the Board issued certification order no. 7776-U on May 10, 2000. The description of the bargaining unit reads as follows:

> **all employees** working at TVA Group Inc. in Montréal, **excluding** the positions identified in the attached **Appendix A.**
>
> (emphasis added)

[88] The Board has ruled time and again on applications filed pursuant to section 18 of the *Code* to obtain clarification on the intended scope of certification orders. This was the case in *Vidéotron Télécom Ltée*, 2003 CIRB LD 909, which became the subject of a reconsideration decision (*Vidéotron Télécom Ltée*, 2004 CIRB LD 987) and a decision by the Federal Court of Appeal, in *Vidéotron Télécom Ltée* v. *Communications, Energy and Paperworkers Union of Canada*, *supra*. In that matter, on joint application by the employer and the union, the Board issued an order merging two bargaining units for which the union had been certified into one. The general unit was described as follows:

> all employees of Vidéotron Télécom Ltée, **excluding** the engineers, sales employees, office employees, coordination officers, project managers, departmental heads and those above.

[89] There were two issues in that matter. The employer was contending that the bargaining certificate could not cover professional positions and computer-related positions; the union disagreed. The employer was asking this: Is this unit a general unit that covers all employees, past, present and future, with the exception of positions that are specifically excluded?

[90] In *Vidéotron Télécom Ltée (LD 909)*, *supra*, a majority of the panel found that the positions at issue were included in the bargaining unit. It stated the following:

> ... we must explain the intended scope of a bargaining certificate issued by the Board in the case of a "universal" bargaining unit description, that is, a unit consisting of "all employees." Such a bargaining unit is not frozen as of the date of the certification order. It is designed to evolve over time and should include all the positions and job titles, unless the facts warrant their exclusion. This approach ensures that the certification continues to apply to "all employees," without necessitating an amendment each time the employer creates a new position or job title.
>
> (page 7)

[91] In that matter, the Board relied on an earlier decision issued by it, in *NorthwesTel Inc.*, 1999 CIRB LD 158, in which it had stated the following:

> To guide the parties in their ongoing relationship, it would be beneficial to explain the intended scope of the Board's certification orders in the case of universal or "all employee" bargaining unit descriptions, as the one issued to these parties. The nature of the universal bargaining unit description is that it is not frozen as of the date of the certification order being issued. Rather, it is intended to stand the test of time and should include new classifications or positions of a similar nature, unless the facts warrant their exclusion from the bargaining unit. This approach ensures that the existing certification order continues to apply to "all employees" within the meaning of the *Code*, without necessitating an amendment each time the employer creates a new classification or position.
>
> (page 4)

[92] It is interesting to note what the Board indicated in *Vidéotron Télécom Ltée (LD 987)*, *supra*, which was affirmed by the Federal Court of Appeal:

> It should also be noted that the certificate issued by the Board on May 10, 2000, is unambiguous:
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> ...
>
> Therefore, positions that are not part of the exclusions must be included in the bargaining unit. The tendency of the Board is to favour larger units. It appears that this principle was applied when the unit description was redefined in 2000 to include all employees of Vidéotron Télécom Ltée. The employer's argument that the merged unit cannot be greater in number than the two formerly separate units is without merit. On the contrary and to the extent that the description is universal, it may increase in number over time.
>
> (page 4)

[93] In another decision issued by it in 2006, in *NorthwesTel Mobility Inc.*, 2006 CIRB 346, the Board had to rule on the inclusion or exclusion of positions related to retail operations. The employer argued that these positions had never been meant to be included in the bargaining unit and that the positions had been created after the certification order had been issued. After examining the union's bargaining certificate, in which the bargaining unit description read in part "all employees of NorthwesTel Inc., **excluding**," the Board indicated the following:

> [7] The description is unequivocally an all-employee bargaining unit. The Board has consistently held that an all-employee bargaining unit means just that it includes all employees unless excluded by the terms of the certification order. **Accordingly, any new classification or position is included in the bargaining unit, unless the parties agree to its exclusion or the Board agrees to modify the scope of the bargaining unit to exclude it (see *NorthwesTel Inc.*, December 13, 1999 (CIRB LD 158)).**
>
> ...
>
> [9] The Board is not quite sure what is meant by the employer's submission that the "spirit of the 2002 certification" should survive as a basis for excluding all managerial positions from the bargaining unit.

> The certificate under review indicates **specific** exclusions, which commonly means that only the positions expressly named are excluded.
>
> ...
>
> [13] ... Unless specifically excluded by the parties or an order of the Board, an "employee" under section 3 of the *Code*, comprises "any person employed by an employer... but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations." In this case, it has not been demonstrated that the retail sales positions at issue meet the criteria for exclusion set out in section 3 of the *Code*.

[94] In the instant matter, in view of the Board's policies and jurisprudence, and based on the fact that the description of the bargaining unit at issue contains the words "all employees," the Board finds that the bargaining unit is a universal unit. Consequently, any new classifications or new positions in TVA Group are included in the bargaining unit unless the parties agree to their exclusion or they are specifically excluded either because the positions meet the exclusion criteria set out in section 3 of the *Code* or because the positions are held by employees of other TVA Group employers which business place is located at 1600 De Maisonneuve Boulevard East.

[95] The employer is of the view that the Board should give the said bargaining certificate a narrow interpretation given the exclusions set out in Appendix A of the certificate. It maintains that section 2 of Appendix A, which excludes employees of other TVA Group employers, is not static and should apply to employees of TVA Interactif.

[96] The three types of exclusions set out in Appendix A of the certification order issued on May 10, 2000 (no. 7776-U) are as follows:

> - persons employed in a managerial or trustee position, comprising access to confidential information relating to labour relations;
>
> - employees of employers other than TVA Group Inc., which business place is located at 1600 De Maisonneuve East, **namely** JPL Production Inc., JPL Production II Inc., TVA Ventes et Marketing Inc., HSS Canada Inc., TVA International Inc., TVA Direct Inc., Club TVAchat Inc.; and
>
> - employees already covered by other bargaining certificates.

[97] Can the exclusion relating to other TVA Group employers set out in section 2 of Appendix A apply to the employees of TVA Interactif, as contended by the employer?

[98] The Board does not believe so. It is true that, as the employer contends, the wording of section 2 in its current form is not static or restrictive, since it contains the word "namely." [Note: The translation of "notamment" by "namely" in the English version of Board order no. 7776-U may not be the most accurate.] The Board is of the view that employees of other TVA Group employers may be covered by this exclusion, even if not specifically referred to in the certificate.

[99] According to the testimony of Mr. Christian Bougie, Human Resources Manager with TVA Group, such excluded employers carry out operations that are not directly linked with broadcasting operations, which would be the case with Club TVAchat Inc. and TVA Ventes et Marketing, for example. However, the Board considers that TVA Interactif cannot be an excluded employer within the meaning of section 2 of Appendix A since it is a division of TVA Group, as may be seen from the TVA Group organization chart entered into evidence. In any event, the issue of the true employer does not arise in this matter and the employer recognized at the outset that the persons covered by the application were its employees.

[100] Consequently, the Board rejects the employer's argument that the employees of TVA Interactif are covered by the exclusion in section 2 of Appendix A of the bargaining certificate issued on May 10, 2000 (no. 7776-U).

[101] For the foregoing reasons, the Board grants the union's application and finds that the positions of TVA Interactif employees are included in the bargaining unit.

[102] The employer has asked the Board to exclude the following positions from the unit, on the basis of their status as representatives of the employer:

- Head of Design, development and maintenance, a position held by Mr. Pascal Cadieux;
- Head, Project Office, a position held by Ms. Chantal Gagnon;
- Head, Strategy, a position held by Mr. Philippe Rincon.

[103] The employer alleges that the incumbents of these positions are responsible for hiring, disciplining and evaluating employees under their responsibility.

[104] Given that the union has not made any submissions regarding this request by the employer, the Board will remain seized of the matter in order to decide the issue. The Board directs the union to present its submissions in this regard within 15 days of receipt of this decision and the employer will be given 15 days from receipt of the union's response to submit a reply.

Translation

Louise Fecteau
Vice-Chairperson